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**IN THE
COURT OF APPEALS OF INDIANA**

RONALD SIMES, JR.,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 45A03-0611-CR-524
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable William T. Enslen, Judge Pro Tempore
Cause No. 45G01-0503-FA-14

August 3, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Ronald Simes appeals his conviction and sentence for Class C felony neglect of a dependent and the trial court's determination of pretrial credit. We affirm.

Issues

Simes raises three issues on appeal:

- I. whether there was sufficient evidence to convict him of Class C felony neglect of a dependent;
- II. whether his sentence is appropriate; and
- III. whether the trial court properly calculated his pretrial credit.

Facts

In February 2005, Ann Marie Saucedo and four of her children moved into Simes's apartment to live with him. Simes voluntarily began to watch Saucedo's children during the day while she worked at a nearby hospital as a certified nursing assistant. On February 20, Saucedo left the house for about fifteen minutes. When she returned, M.S., who was twenty-one months old, had a serious burn on the heel of his foot. Simes told her that he had been preparing to mop his kitchen floor with boiling water mixed with cleaner, which was how he typically cleaned his floors. He said that he had placed a container of boiling water and cleaner on the floor and left the room to use the bathroom. He told her that he heard M.S. scream, and he ran in the room and found that M.S. had a burn on his foot.

Saucedo did not want to take M.S. to the hospital because she feared that her children would be taken away from her, even though she had never had a negative report

filed with the Department of Child Services. She and Simes bought antibiotics and gauze to take care of the wound. Simes asked Saucedo repeatedly to take M.S. to the doctor over the next few weeks, but she refused. Saucedo cut the blister open with a razor. Simes took care of the burn, changing the dressing several times per day. At one point, in an attempt to treat the wound, Simes poured salt on it. This caused M.S. to scream, and Simes washed the salt off. After a few weeks, the burn became infected, was oozing pus, and began to smell. Saucedo still would not agree to take M.S. to the doctor.

On the afternoon of March 17, Saucedo returned from work and was taking a bath. Simes was feeding M.S. some noodles. While in the bath, Saucedo heard the sound of a thump, M.S. crying, and Simes saying “what, [M.S.], what?” Tr. p. 399. She was certain that the sounds came from the living room and not the kitchen. A few minutes later Simes began to call to Saucedo for help. M.S. was lying on a mattress in the living room, gagging. Simes put his fingers into M.S.’s mouth to make sure he was not choking on the noodles. M.S. had stopped breathing. Saucedo attempted to give M.S. the Heimlich maneuver. Saucedo drove to the hospital, while Simes sat in the backseat with M.S. and attempted to give him CPR.

Upon their arrival at the hospital at 3:15 p.m., Simes told the doctors that M.S. had choked on some noodles. The doctors attempted several life-saving procedures on M.S. They were unable to revive him and pronounced him dead at 4:24 p.m. The doctor who filled out the chart believed that M.S.’s death was caused by sepsis stemming from the burn on his foot, which was a third degree burn. Several results in M.S.’s bloodwork were indicative of sepsis. The doctors also noticed that M.S. had several scabs on his

face, hands, navel, and feet, and bruises on his face, chest, and back. Hospital staff called Child Protective Services.

Simes initially told the emergency room doctors and the police officers who interviewed him that when M.S. began choking, he had turned to watch the television for a minute. After M.S.'s death, Simes admitted to police that he put M.S. on the kitchen table while he was filling M.S.'s cup with juice. He saw M.S. picking at his foot, and then M.S. fell backwards off the table, hitting his head on the floor. His statement contradicted Saucedo's testimony that she heard the sounds coming from the living room. Simes told officers that M.S. cried at first but then acted fine for several minutes before he returned to the living room where he started choking. Simes told officers that he had been afraid to tell anyone about M.S.'s fall, because he did not want Saucedo to think he was being careless with her children. Simes also told police that the scabs on M.S.'s face, hands, and feet were from M.S.'s three-year-old sister biting him.

A forensic pathologist performed an autopsy on M.S. The pathologist noted that M.S. had several bruises in various stages of healing on his head, face, neck, back, and chest. The scabs on M.S.'s face, hands, and feet appeared to be bite marks from a child or small animal. The pathologist's opinion was that the burn on M.S.'s heel was not caused by liquid. He noted that there were no satellite burns, which are generally present in liquid burns, due to splashing that occurs. The pathologist found that microscopically, the burn appeared to be from a dry heat source, such as an open flame, which would have occurred at a temperature higher than boiling water. The pathologist concluded, however, that the cause of death was unrelated to the burn but was instead blunt force

injury to the head. The pathologist's opinion was that, although the type of head injury that M.S. sustained could be consistent with a fall, the distance M.S. fell off the table would have been insufficient to cause an injury as serious as M.S.'s. The pathologist also noticed there were smaller contusions on the brain, which he associated with Shaken Baby Syndrome.

Simes was charged with Class A felony neglect of a dependent.¹ Two jury trials were held, both resulting in mistrials due to deadlocked juries. On September 15, 2006, a third trial was held, and a jury found Simes guilty of the lesser-included offense of Class C felony neglect of a dependent.

On October 5, 2006, Simes was sentenced to eight years. The trial court awarded him credit for 568 days spent in confinement while awaiting trial. The court doubled it for good time credit for a total of 1136 days. The trial court ordered the sentence to run consecutive to a conviction from Wisconsin for which Simes was currently on parole. The court sua sponte set another sentencing hearing for December 11, 2006, because it received a letter from the Wisconsin Department of Corrections stating that Simes would get credit in Wisconsin for the time he spent in Indiana. The trial court amended its order and gave Simes only 568 days credit for the instant conviction. Simes now appeals his conviction and sentence.

Analysis

I. Sufficiency of the Evidence

¹ Saucedo was also charged with and pled guilty to Class B felony neglect of a dependent.

Simes asserts that the evidence was insufficient to support his conviction for Class C felony neglect of a dependent. When reviewing a claim of insufficient evidence, we neither reweigh the evidence nor judge the credibility of witnesses. Trimble v. State, 848 N.E.2d 278, 279 (Ind. 2006). We will affirm if the probative evidence and reasonable inferences drawn therefrom could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. Williams v. State, 834 N.E.2d 225, 229 (Ind. Ct. App. 2005).

In order to convict Simes for Class C felony neglect of a dependent, the State had to prove that: (1) Simes had care of M.S., either voluntarily or due to legal obligation; (2) he knowingly or intentionally placed M.S. in a situation that endangered his life or health; (3) which situation resulted in bodily injury. See Ind. Code § 35-46-1-4.

The State presented evidence that Simes invited Saucedo and her children to live with him. He voluntarily watched her children every day while she was at work and at other times when she was running errands or otherwise occupied. Simes was caring for M.S. on the day he was burned, on the weekdays after he was burned, and while Saucedo was in the bath on the day M.S. died. A reasonable trier of fact could conclude that Simes had voluntarily assumed care of M.S. The State clearly satisfied the third element of bodily injury through uncontradicted testimony that M.S. had a third degree burn on his heel and a head injury.

Simes contends, however, that the State did not prove that he knowingly or intentionally placed M.S. in a situation that placed his life in danger. “A ‘knowing’ mens rea under this statute is met if the accused ‘must have been subjectively aware of a high

probability that he placed the dependent in a dangerous situation.” Gross v. State, 817 N.E.2d 306, 308 (Ind. Ct. App. 2004) (quoting Armour v. State, 479 N.E.2d 1294, 1297 (Ind. 1985)). Our supreme court has cautioned that the statute must be read as “applying only to situations that expose a dependent to ‘an actual and appreciable’ danger to life or health.” Id. at 309 (quoting State v. Downey, 476 N.E.2d 121, 123 (Ind. 1985)).

Simes concedes that leaving the boiling water on the floor and placing M.S. on the kitchen table were “inept [by] parenting standards,” Appellant’s Br. p. 8, but he argues that his behavior did not rise to the “actual and appreciable” standard as articulated in Gross. In Gross, we explained:

It seems clear that to be an “actual and appreciable” danger for purposes of the neglect statute when children are concerned, the child must be exposed to some risk of physical or mental harm that goes substantially beyond the normal risk of bumps, bruises, or even worse that accompany the activities of the average child.

Id.

First, we note that M.S.’s injuries were “substantially beyond the normal risk of bumps [and] bruises.” Id. He had a third degree burn, left untreated for nearly a month, and a fatal head injury. The jury reasonably could have concluded from the State’s evidence that Simes knowingly placed M.S.’s life in danger on any number of theories advanced: that the head injury sustained by M.S. could not have been caused by a fall from a table, that the burn to M.S.’s foot was caused by dry heat, such as an open flame, that M.S. showed symptoms of Shaken Baby Syndrome, that Simes had left a container of boiling water on the floor of his home without knowing the whereabouts of his twenty-

one-month-old dependent, or that he placed M.S. on the edge of a kitchen table and walked away.

At the very least, the jury reasonably could have concluded that Simes's failure to obtain medical treatment for M.S.'s burn placed him grave danger. Our supreme court has held that "[w]hen there are symptoms from which the average layperson would have detected a serious problem necessitating medical attention, it is reasonable for the jury to infer that the defendant knowingly neglected the dependent." Mitchell v. State, 726 N.E.2d 1228, 1240 (Ind. 2000). Simes testified that eventually the burn began to ooze pus and smell bad. He noticed that M.S. "wasn't hisself" and did not want to eat. Tr. p. 619. Simes also testified that he was advised by his mother to take M.S. to the doctor despite Saucedo's objection. The average layperson would have detected that M.S. needed professional medical treatment. Accordingly, there was sufficient evidence for the jury to reasonably conclude that Simes knowingly placed M.S. in a situation that endangered his life or health.

II. Sentence

Simes contends that his sentence is inappropriate in light of the nature of the offense and his character under Indiana Appellate Rule 7(B). The trial court sentenced Simes to eight years, the maximum for a Class C felony. See I.C. § 35-50-2-6. In favor of Simes's character, we note that at his sentencing hearing, Simes spoke at length about how terrible he felt about M.S.'s death. He apologized to M.S.'s family and his own family. He thanked his attorney and the court for insuring that he got "not one, but three fair trials." Sentencing Tr. p. 45. The expression of remorse can be a valid mitigating

circumstance. Frey v. State, 841 N.E.2d 231, 235 (Ind. Ct. App. 2006). Simes also notes that he attended counseling programs and actively participated in the jail ministry, which we will consider as positive aspects of his character. Simes's criminal history is also relevant to his character. See Childress v. State, 848 N.E.2d 1073, 1081 (Ind. 2006). As a juvenile, Simes had two adjudications, and as an adult, he had seven misdemeanor convictions and one felony conviction for aggravated battery. We conclude that Simes's character reflects remorse but also indicates that he has a continuing problem with abiding by the law.

We also consider the nature of the offense. M.S. received a serious burn, and Simes neglected to get medical care for M.S. Although we acknowledge that Saucedo told him not to take her son to the doctor, it was clear to Simes that the burn was getting worse and that M.S. was not acting normal. Simes poured salt on the burn, which a doctor testified would have caused M.S. "horrendous . . . pain." Tr. p. 138. The burn was left untreated for so long that emergency room doctors concluded that M.S. had sepsis.

Simes asks that we consider his lack of prior parenting experience, but we cannot attribute his actions to that of a new parent. The nature of this offense is appalling. M.S. clearly needed medical attention for the burn, and Simes failed to help him. Then M.S. sustained a severe head injury, but Simes misled the doctors and police by initially failing to tell them that M.S. had hit his head minutes before he stopped breathing. We conclude that the maximum sentence of eight years is not inappropriate.

III. Pretrial Credit

Simes contends that the trial court erred when it re-sentenced him and took away 568 days of pretrial credit. At the first sentencing hearing, the trial court found that Indiana Code Section 35-50-1-2(d) applied. This section provides:

If, after being arrested for one (1) crime, a person commits another crime:

(1) before the date the person is discharged from probation, parole, or a term of imprisonment imposed for the first crime; or

(2) while the person is released:

(A) upon the person's own recognizance;
or

(B) on bond;

the terms of imprisonment for the crimes shall be served consecutively, regardless of the order in which the crimes are tried and sentences are imposed.

I.C. § 35-50-1-2(d). The trial court concluded that because the instant offense was a violation of Simes's parole under his Wisconsin conviction, Simes's sentence for this offense was required to run consecutive to the Wisconsin sentence.

The parties then argued about the calculation of pretrial credit. The trial court stated: "I don't believe that I have any authority to tell a court in Wisconsin that they have to give him credit on parol[e] in Wisconsin. I think I only have the authority to deal with . . . the resulting sentence that's here in Indiana and our statute as it relates to pretrial confinement credit." Sentencing Tr. p. 9. The trial court found that Simes was entitled to 568 days credit, which it doubled for good time credit to 1136 days. After the

Wisconsin Department of Corrections sent a letter stating that it would apply pretrial credit to Simes, the trial court re-sentenced Simes and revoked 568 days pretrial credit that Simes would be receiving in Wisconsin.

Although Simes notes that there is an important distinction between consecutive and concurrent sentences, he relies only upon authority relating to concurrent sentences. Our supreme court has explained that credit time in consecutive and concurrent cases does not operate in the same manner. In Corn v. State, 659 N.E.2d 554, 558 (Ind. 1995), the court held that in consecutive sentencing cases, pretrial credit is awarded against the aggregate sentence, not each individual sentence. To award credit on each sentence effectively would “enable[] a defendant to serve part of his sentences concurrently, a result the legislature could not have intended.” Diedrich v. State, 744 N.E.2d 1004, 1006 (Ind. Ct. App. 2001).

Here, the trial court properly sentenced Simes to consecutive sentences. Once the court had determined that Simes would be receiving credit in Wisconsin, the court deleted the identical credit in Indiana. Otherwise, Simes would have received the same credit on each sentence, rather than on the aggregate sentence, as required by Corn. Although the trial court deleted the pretrial credit of 568 days that Simes was receiving in Wisconsin, Simes was permitted to retain the other 568 days that he had earned in good time credit. We conclude that the trial court properly calculated Simes’s pretrial credit.

Conclusion

The evidence is sufficient to support Simes's conviction for Class C felony neglect of a dependent. The sentence of eight years was not inappropriate, and the trial court properly calculated pretrial credit time. We affirm.

Affirmed.

NAJAM, J., and RILEY, J., concur.